RECORD AND BRIEFS

No. 16-111

Supreme Court, U.S.
FILED
SEP - 1 2017
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., et al.,

Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION, et al.,

Respondents.

On Writ Of Certiorari To The Colorado Court Of Appeals

BRIEF OF *AMICI CURIAE* SOUTHEASTERN LEGAL FOUNDATION AND INTERNATIONAL LAW SCHOLARS IN SUPPORT OF PETITIONERS

KIMBERLY S. HERMANN
SOUTHEASTERN LEGAL FOUNDATION
2255 Sewell Mill Rd., Ste. 320
Marietta, Georgia 30062

JOHN J. PARK, JR.
Counsel of Record
STRICKLAND BROCKINGTON LEWIS LLP
1170 Peachtree St., Ste. 2200
Atlanta, Georgia 30309
(678) 347-2208
jjp@sbllaw.net

Counsel for Amici Curiae

September 1, 2017

QUESTION PRESENTED

Jack Phillips is a cake artist. The Colorado Civil Rights Commission ruled that he engaged in sexual orientation discrimination under the Colorado Anti-Discrimination Act ("CADA") when he declined to design and create a custom cake honoring a same-sex marriage because doing so conflicts with his sincerely held religious beliefs.

The Colorado Court of Appeals found no violation of the Free Speech or Free Exercise Clauses because it deemed Phillips' speech to be mere conduct compelled by a neutral and generally applicable law. It reached this conclusion despite the artistry of Phillips' cakes and the Commission's exemption of other cake artists who declined to create custom cakes based on their message. This analysis (1) flouts this Court's controlling precedent, (2) conflicts with Ninth and Eleventh Circuit decisions regarding the free speech protection of art, (3) deepens an existing conflict between the Second, Third, Sixth, and Eleventh Circuits as to the proper test for identifying expressive conduct, and (4) conflicts with free exercise rulings by the Third, Sixth, and Tenth Circuits.

The question presented is:

Whether applying Colorado's public accommodations law to compel Phillips to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. The First Amendment's Free Exercise and Free Speech Clauses extend their protection to those who dissent from the prevailing orthodoxy 6

A. The First Amendment's Free Exercise Clause encompasses protection for religiously grounded exercises of one's conscience 7

B. This Court's Free Speech jurisprudence protects a wide range of speech, including speech that many find objectionable 11

II. Application of free speech principles from international law and the laws of other nations undermines our Constitution because they do not protect speech or the free exercise of religion to the degree the First Amendment does 16

TABLE OF CONTENTS – Continued

Page

A. The respect for free exercise and free speech displayed by some European countries stands in marked contrast with that given by the Constitution of the United States, federal statutes, and this Court's jurisprudence 19

B. Canada's Charter of Rights and Freedoms allows a judicial balancing inconsistent with American judicial doctrine and reaches results that this Court would not reach 22

III. This Court should not abandon its First Amendment jurisprudence for that of Europe and Canada 26

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564 (2002) 12

Bennie v. Munn, 137 S. Ct. 812 (2017) 1

Brillinger v. Brockie, (2000) 00-003-R (OHRC) 24, 25

Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60 (1983) 12

Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) 1

Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) ..... *passim*

Ctr. for Competitive Politics v. Harris, 136 S. Ct. 480 (2015) 1

Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) 6

Citizens United v. FEC, 558 U.S. 310 (2010) 12

Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 565 U.S. 171 (2012) 9, 10, 21

Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Grp. of Boston, 515 U.S. 557 (1995) 18

Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North Am., 344 U.S. 94 (1952) 10, 21

Matal v. Tam, 137 S. Ct. 1744 (2017) 14, 15, 24, 26

Minority TV Project v. FCC, 134 S. Ct. 2874 (2014) 1

TABLE OF AUTHORITIES – Continued

Page

Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972) 12

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) 6, 13

Saskatchewan Human Rights Comm'n v. Whatcott, [2013] 1 S.C.R. 467 (Can.) 23, 24

Serbian E. Orthodox Diocese for U.S. and Canada v. Milivojevich, 426 U.S. 696 (1976) 10

Sherbert v. Verner, 374 U.S. 398 (1963) 8, 26

Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 195 (1991) 12, 14

Snyder v. Phelps, 562 U.S. 443 (2011) 4, 15, 16

Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334 (2014) 1

Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707 (1981) 6, 7, 8, 9

United States v. Alvarez, 567 U.S. 709 (2012) 14, 26

United States v. Stevens, 559 U.S. 460 (2010) 13, 14, 24

Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872) 10

Whitney v. California, 274 U.S. 357 (1927) 12

Wisconsin v. Yoder, 406 U.S. 205 (1972) 8, 9

Wollschlaeger v. Governor, State of Fla., 848 F.3d 1293 (11th Cir. 2017) 12, 13

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONS

U.S. Const. amend. I ..... *passim*

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 (U.K.) 4, 22, 23

STATUTES

15 U.S.C. § 1052(a) 14

St. Paul, Minn. Legis. Code § 292.02 (1990) 13

RULES

Sup. Ct. R. 37.3(a) 1

Sup. Ct. R. 37.6 1

OTHER AUTHORITIES

1 John Trenchard & William Gordon, Cato's Letters: Essays on Liberty, Civil and Religious 99 (1724), reprinted in Jeffrey A. Smith, Printers and Press Freedom: The Ideology of Early American Journalism 25 (Oxford University Press 1988) 11

Andrew Stuttaford, *Britain's War on Free Speech (Continued)*, National Review (Aug. 23, 2017) 22

Benjamin Franklin's 1789 newspaper essay, reprinted in Jeffrey A. Smith, Printers and Press Freedom: The Ideology of Early American Journalism 25 (Oxford University Press 1988) 12

TABLE OF AUTHORITIES – Continued

Page

Dale Hurd, *Swedish Prime Minister: Priests Should Be Forced to Perform Same-Sex Weddings*, CBN News (June 23, 2016) 21

David French, *Media Beware: The Southern Poverty Law Center Has Become a Dangerous Joke*, National Review Online (July 13, 2017) 18

Hans C. Clausen, Note, *The "Privilege of Speech" in a "Pleasantly Authoritarian Country": How Canada's Judiciary Allowed Laws Proscribing Discourse Critical of Homosexuality to Trump Free Speech and Religious Liberty*, 38 Vand. J. Transnat'l L. 443 (2005) 25

Heidi Blake, *Christian preacher arrested for saying homosexuality is a sin*, The Daily Telegraph (May 2, 2010) 20

International Convention on the Elimination of All Forms of Racial Discrimination, 12 Mar. 1969, 660 U.N.T.S. 195 .....16, 17

Jacob Poushter, *40% of Millennials OK with limiting speech offensive to minorities*, Pew Research Center (Nov. 20, 2015) 18

Jenna Murphy, *Belgian Bishop Cleared of Anti-Homosexual 'crime'*, Catholic Online (June 6, 2008) 19

John Carpay, *Canada Can Defend Against Terrorism Without Trampling On Our Freedoms*, The Huffington Post (Aug. 11, 2017) 5

TABLE OF AUTHORITIES – Continued

Page

Lucy Draper, *Swiss Gay Group Files Criminal Complaint Against Catholic Bishop for Old Testament Speech*, Newsweek (Aug. 10, 2015).....20

Miriam Katawazi, *Mississauga man faces hate-crime charge after probe into online material targeting Muslims*, The Globe and Mail (July 24, 2017).....25

Naomi Frisht, *We don't need the State to police hate: Let's trust citizens, not officials, to challenge prejudice online*, Spiked (Aug. 22, 2017).....21

Paul Coleman, *Europe's Free Speech Problem: A Cautionary Tale*, Public Discourse (July 5, 2016).....17, 19, 20, 21

Peter Balinski, *Spanish prosecutor to investigate Cardinal-elect for calling homosexuality 'defective'*, Lifesite (Feb. 7, 2014).....19

Ron Csillag, *JDL leader files hate complaint against imam who urged killing Jews*, The Canadian Jewish News (Feb. 22, 2017).....26

Southern Poverty Law Center, https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom.....18

Steve Doughty, *Payout for anti-gay preacher over arrest: Landmark ruling in Christian's battle for free speech*, The Daily Mail (Dec. 10, 2010).....20

The Christian Institute, *Street preacher held by Police for 19 hours gets £13,000* (Mar. 31, 2014).....20

INTEREST OF *AMICI CURIAE*[1]

Founded in 1976, Southeastern Legal Foundation (SLF) is a national nonprofit, public-interest law firm and policy center that advocates individual liberties, limited government, and free enterprise in the courts of law and public opinion. For 40 years, SLF has advocated, both in and out of the courtroom, for the protection of our First Amendment rights. This aspect of its advocacy is reflected in regular representation of those challenging overreaching governmental actions in violation of their freedom of speech. *See, e.g.*, *Bennie v. Munn*, 137 S. Ct. 812 (2017); *Ctr. for Competitive Politics v. Harris*, 136 S. Ct. 480 (2015); *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014); *Minority TV Project v. FCC*, 134 S. Ct. 2874 (2014); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

SLF has an abiding interest in the protection of the freedoms set forth in the First Amendment – specifically the freedom of speech and the freedom to exercise one's religion. This is especially true when the law suppresses free discussion and debate on public issues that are vital to America's civil and political institutions, and when the law suppresses one from expressing his or her religious beliefs. SLF is profoundly committed to the protection of American legal heritage,

---

[1] All parties have consented to the filing of this brief by blanket consent or individual letter. *See* Sup. Ct. R. 37.3(a). No counsel for a party has authored this brief in whole or in part, and no person other than *amici curiae*, its members, and its counsel has made monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

which includes all of those protections provided for by our Founders in the First Amendment.

A number of international scholars versed in the laws of their countries and in international law join this brief. Through their work, these scholars promote the values of freedom of conscience and free speech in their respective countries and in their regions. For example, the Ordo Iuris Institute in Warsaw, Poland gathers academics and legal practitioners who promote a legal culture based on the respect for human dignity and rights, particularly the rights to freedom of religion, freedom of conscience, freedom of speech, and the right to life. The Institute for Religious Freedom in Kyiv, Ukraine, has as its main goal the protection and promotion of freedom of religion and other related human rights.

Amici are listed below in alphabetical order. Their institutional affiliations are provided for identification purposes only:

Mojca Kucler Dolinar, Associate, Academic Lawyers' Association, Ljubljana, Slovenia; Former Government Minister for Higher Education, Science and Technology, and delegate to the Parliamentary Assembly of the Council of Europe;

Eric Enlow, Dean, Handong International Law School, Korea;

Massimo Introvigne, Managing Director, Center for Studies on New Religions (CESNUR), Turin, Italy; Former Representative on Combating racism, xenophobia and discrimination for the Organization for

Security and Co-operation in Europe and Chairperson of the Observatory on Religious Freedom of the Italian Ministry of Foreign Affairs;

MUDr. Roman Joch, Director of the Civic Institute, Prague, Czech Republic;

Dr. Viktor Kostov, Attorney, Chief Editor and Director, Freedom for All, Sofia, Bulgaria;

Jerzy Kwasniewski, Attorney, Vice-President of Ordo Iuris Institute for Legal Culture, Poland;

Nancy Lefèvre, Legal Counsel, National Council of French Evangelicals (Cnef), Paris, France;

Senator Rónán Mullen, Irish Senator, Delegate to the Parliamentary Assembly of the Council of Europe;

Dr. Vanja-Ivan Savić, Assistant Professor of Law, University of Zagreb, Croatia;

Prof. Aleksander Stępkowski, Professor at the Faculty of Law and Administration, University of Warsaw, Head of the Sociology of Law Chair; President of the Ordo Iuris Institute for Legal Culture; Former Undersecretary of State for Treaty and Human Rights in the Ministry of Foreign Affairs of the Republic of Poland;

S. Ernie Walton, Lecturer, Regent University School of Law; Academic and Administrative Director, Center for Global Justice, Human Rights, and the Rule of Law; and

Oleksandr Zaiets, Head of the Board, Institute for Religious Freedom, Kyiv, Ukraine.

SUMMARY OF ARGUMENT

"As a nation, we have chosen a different course – to protect even hurtful speech on public issues to ensure that we do not stifle public debate." *Snyder v. Phelps*, 562 U.S. 443, 461 (2011). The Constitution provides robust protection for Free Exercise and Free Speech rights. For example, the Free Exercise Clause protects Seventh Day Adventists, Jehovah's Witnesses, Mennonites, and Christians from the imposition of state power. And the Free Speech Clause extends to cover the hurtful speech of the members of the Westboro Baptist Church and liars like Xavier Alvarez.

Several countries in Europe and Canada have gone in a different direction. For its part, a number of European countries and British prosecutors have badgered Catholic clergy and street preachers, and the Crown Prosecution Services plans to police hate speech on social media. Canada has reached similar results under its Charter of Rights and Freedoms, which "guarantees" fundamental rights "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, c 1 (U.K.). That enables a judicial balancing alien to this Court's First Amendment jurisprudence.

This case offers this Court a chance to reaffirm our own constitutional values as opposed to adopting those prevailing elsewhere in the world. Doing otherwise as the lower court did and as Respondents ask this Court

to do, embarks on a road that will end with religious exercise confined to the home and protected speech being subjected to self-censorship. In short, "[i]f fundamental freedoms can be enjoyed only selectively, provided you don't say the 'wrong' thing, and provided that you don't belong to the 'wrong' religion, they are worthless." John Carpay, *Canada Can Defend Against Terrorism Without Trampling On Our Freedoms*, The Huffington Post (Aug. 11, 2017).[2]

ARGUMENT

Our Constitution is unique in that the First Amendment provides robust and substantial protection for the rights to Free Exercise and Free Speech. This protection contrasts to the way several members of the European Union view the wisdom of protecting the same rights. Given that the protection in the United States is grounded in the Constitution, this Court should follow the Constitution and not follow those European Union nations and other nations down the garden trail to a land in which speech can be compelled and conscience-based religious beliefs overridden for the perceived public good thought to follow from that compulsion and overriding.

[2] *Available at* http://www.huffingtonpost.ca/john-carpay/canada-can-defend-against-terrorism-without-trampling-on-our-fre_a_23074921/.

I. The First Amendment's Free Exercise and Free Speech Clauses extend their protection to those who dissent from the prevailing orthodoxy.

The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." U.S. Const. amend. I. This case implicates two of the freedoms provided for in the First Amendment – the freedom to exercise one's religion and freedom of speech.

Notably, this Court has held that "the First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (internal citations omitted). With respect to the Free Exercise Clause specifically, this Court has found that it "gives special protection to the exercise of religion." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 713 (1981). And that, "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993).

A. The First Amendment's Free Exercise Clause encompasses protection for religiously grounded exercises of one's conscience.

The breadth of the protection provided by the Free Exercise Clause is reflected in the fact that, because of their sincerely held religious beliefs, the Amish do not have to attend schools, Sabbatarians do not have to work on Saturdays, Jehovah's Witnesses do not have to work in armaments factories, and Mennonites and Christians cannot be required to provide insurance that covers contraceptives and abortifacients. Both the Constitution and federal statutory law demand that religiously grounded claimants be treated with respect. As this Court recently explained:

> In our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law. For those who choose this course, *free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts*.

Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring) (emphasis added).

In *Thomas*, a Jehovah's Witness who worked in a steel factory was transferred to an armaments factory and quit because making armaments contradicted his religious beliefs. 450 U.S. at 720. This Court held that even though Thomas quit his job voluntarily, because he was forced to do so due to his religious beliefs, he was entitled to receive unemployment benefits. *Id.*

Writing for the Court, Chief Justice Burger noted that the determining question before it was whether Thomas "terminated his work because of an honest conviction that such work was forbidden by his religion." *Id.* at 716. And, the fact that "the Indiana law does not *compel* a violation of conscience" was "only the beginning, not the end, of [the Court's] inquiry." *Id.* at 717 (internal quotation omitted). The Court ultimately reversed the lower court, holding that none of the interests advanced by the State justified the burden placed on Thomas' religious liberty. *Id.* at 719 ("When the focus of the inquiry is properly narrowed, . . . we must conclude that the interests advanced by the State do not justify the burden placed on free exercise of religion.").

Thomas drew on this Court's decisions in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In *Sherbert*, the Court held that South Carolina could not deny unemployment benefits to a Sabbatarian who declined to work on Saturdays. 374 U.S. at 422. In *Yoder*, the Court held that Wisconsin could not compel members of the Old Order Amish and the Conservative Amish Mennonite Church to send their children to public high school in contravention of their fundamental religious beliefs. 406 U.S. at 234. In doing so the Court noted, "[t]he traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living." 406 U.S. at 216. Imposing the compulsory attendance law on the Amish "carries with it precisely

the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent." *Id.* at 218.

In reaching these results, the Court explained that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas*, 450 U.S. at 714. Moreover, "[i]ntrafaith differences . . . are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses." *Id.* at 715. In the face of an interfaith disagreement, "it is not within the judicial function and judicial competence" to decide which faction is correct. *Id.* at 716; *see also Hobby Lobby*, 134 S. Ct. at 2779 (It is not for the courts to "say that the[] religious beliefs [of the Hahns and Greens] are mistaken or insubstantial."). Accordingly, the judiciary performs the "narrow function" of deciding whether "an honest conviction" that the religious belief is the driving force. *Id.* (internal citation omitted).

This respect for the integrity of church doctrine is reflected in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012). There, this Court unanimously held that the EEOC had no business telling a church school that it could not fire one of its teachers. The Court noted that its "decisions . . . confirm that it is impermissible for the government to contradict a church's determination of who can act as its ministers." *Id.* at 185. This Court extended that line of authority to recognize a ministerial

exception to the employment discrimination laws. *Id.* at 185-87 (discussing *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872); *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94 (1952); and *Serbian E. Orthodox Diocese for U.S. and Canada v. Milivojevich*, 426 U.S. 696 (1976)). It explained: "By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments." *Id.* at 188.

In a concurring opinion, which was joined by Justice Kagan, Justice Alito observed that the ministerial exception should allow religious groups to select those employees it believes suited to "lead[] a religious organization, conduct[] worship services or important religious ceremonies or rituals, or serve[] as a messenger or teacher of its faith." *Id.* at 199. He noted, "The Constitution guarantees religious bodies 'independence from secular control or manipulation – in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Id.* at 199-200 (quoting *Kedroff*, 344 U.S. at 116).[3]

Since *Hosanna-Tabor*, in *Hobby Lobby*, the Court held that the Religious Freedom Restoration Act (RFRA) prevented the Department of Health and

---

[3] Justice Thomas also concurred, expressing his view that "the Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization's good-faith understanding of who qualifies as its minister." *Id.* at 196 (Thomas, J., concurring).

Human Services from requiring religiously-grounded, closely-held for-profit corporations to provide contraceptive and abortifacient drugs to their employees where doing so would violate their sincerely held religious beliefs. It pointed out: "In holding that the HHS mandate is unlawful, we reject HHS's argument that the owners of the companies forfeited all RFRA protection when they decided to organize their businesses as corporations rather than sole proprietorships or general partnerships." 134 S. Ct. at 2759. The companies involved were organized by Mennonites and Christians, and, notwithstanding this Court's abortion jurisprudence, their founders believed that life begins at conception and objected to being required to participate in ending it. The Court explained: "Business practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within th[e] definition" of the "exercise of religion" which is protected by both RFRA and the Constitution. *Id.* at 2770.

Jack Phillips' sincerely held religious beliefs motivate his business conduct. Confining his Free Exercise rights to his home and place of worship, as Respondents seek to do, does great violence to this Court's Free exercise jurisprudence.

B. This Court's Free Speech jurisprudence protects a wide range of speech, including speech that many find objectionable.

Since 1724, freedom of speech has famously been referred to as the "great Bulwark of liberty[.]" 1 John Trenchard & William Gordon, Cato's Letters: Essays

on Liberty, Civil and Religious 99 (1724), reprinted in Jeffrey A. Smith, Printers and Press Freedom: The Ideology of Early American Journalism 25 (Oxford University Press 1988). Upon ratification, the First Amendment "was understood as a response to the repression of speech and the press that had existed in England." *Citizens United v. FEC*, 558 U.S. 310, 353 (2010). Through the First Amendment, our Founding Fathers sought to ensure complete freedom for "discussing the propriety of public measures and political opinions." Benjamin Franklin's 1789 newspaper essay, reprinted in Smith, at 11. "Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law – the argument of force in its worst form." *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

"As a general matter, 'the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002) (quoting *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 65 (1983), itself quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). The State's power must not be used to "'drive certain ideas or viewpoints from the marketplace,' even if a majority of the people might like to see a particular idea defeated." *Wollschlaeger v. Governor, State of Fla.*, 848 F.3d 1293, 1327 (11th Cir. 2017) (Pryor, J., concurring) (quoting *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 195, 116 (1991)). Indeed, "[t]he First Amendment

requires the protection of ideas that some people might find distasteful because tomorrow the tables might be turned." *Id.* at 1330.

In *City of St. Paul*, for example, the Court held that the City's Bias-Motivated Crime Ordinance was facially unconstitutional. That ordinance prohibited the display of a symbol "including, but not limited to, a burning cross or Nazi swastika," that one knows or reasonably should know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *See* 505 U.S. at 380 (quoting St. Paul, Minn. Legis. Code § 292.02 (1990)). The Court found the ordinance unconstitutional because it constituted both content and viewpoint discrimination: "The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." *Id.* at 391. It concluded: "Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire." *Id.* at 396.

"The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits." *United States v. Stevens*, 559 U.S. 460, 470 (2010). Indeed, in *Stevens*, this Court declined the government's invitation to declare a "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *Id.* at 472. Rather, "content-based restrictions on speech have been permitted,

as a general matter, only when confined to the few 'historic and traditional categories [of expression] long familiar to the bar.'" *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (plurality op.) (quoting *Stevens*, 559 U.S. at 468, itself quoting *Simon & Schuster*, 502 U.S. at 127 (1991) (Kennedy, J., concurring in the judgment)).

In *Alvarez*, this Court rejected the notion that "false statements, as a general rule, are beyond constitutional protection." 567 U.S. at 717-18 (plurality op.). Instead, only false statements made in particular contexts can be criminally punished. For all other false statements, the remedy for them is true speech: "The First Amendment itself ensures the right to respond to speech we do not like, and for good reason. Freedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person. And suppression of speech by the government can make exposure of falsity more difficult, not less so." *Id.* at 728.

Even though it split on its rationale, this Court unanimously held that the Lanham Act's provision prohibiting the registration of trademarks that may "disparage . . . or bring . . . into contempt, or disrepute" any "persons, living or dead," *see* 15 U.S.C. § 1052(a), was facially unconstitutional in violation of the Free Speech Clause of the First Amendment. *Matal v. Tam*, 137 S. Ct. 1744, 1753 (2017). In an opinion concurring in part and concurring in the judgment, Justice Kennedy, joined by Justices Ginsberg, Sotomayor, and Kagan, observed that "the Court's cases have long prohibited the

government from justifying a First Amendment burden by pointing to the offensiveness of the speech to be suppressed." *Id.* at 1767 (Kennedy, J., concurring in part and concurring in the judgment) (citing *id.* at 1763-64 (opinion of Alito, J.)).

In *Snyder v. Phelps*, this Court held that the First Amendment protected Phelps and the Westboro Baptist Church from liability from claims including a claim of intentional infliction of emotional distress. 562 U.S. at 459-61. The claims grew out of signs displayed by church members at the funeral for Snyder's son. *Id.* at 448-49. Those signs reflected the church's belief that "God hates and punishes the United States for its tolerance of homosexuality, particularly in America's military." *Id.* at 448. This Court held that Westboro's signs spoke to matters of public concern, explaining:

> The content of Westboro's signs plainly relates to broad issues of interest to society at large, rather than matters of purely private concern. The placards read "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Fag Troops," "Semper Fi Fags," "God Hates Fags," "Maryland Taliban," "Fags Doom Nations," "Not Blessed Just Cursed," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "You're Going to Hell," and "God Hates You." App. 3781-3787. While these messages may fall short of refined social or political commentary, the issues they highlight – the political and moral conduct of the United States and its citizens, the fate of our Nation,

> homosexuality in the military, and scandals involving the Catholic clergy – are matters of public import. The signs certainly convey Westboro's position on those issues, in a manner designed . . . to reach as broad a public audience as possible.

Id. at 454. Thus, even though it was "hurtful to many," and it "cannot be restricted simply because it is upsetting or arouses contempt," *id.* at 456, 458, the Court held it was protected by the First Amendment.

In short, the Free Speech Clause protects a broad range of communications that we find objectionable. This Court should be wary of opening the door to the kind of claims and impositions that follow.

II. Application of free speech principles from international law and the laws of other nations undermines our Constitution because they do not protect speech or the free exercise of religion to the degree the First Amendment does.

In pertinent part, the International Convention on the Elimination of all Forms of Racial Discrimination calls on signatories to "declare an offense punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin." International Convention on the Elimination of All Forms of Racial Discrimination,

opened for signature 12 Mar. 1969, 660 U.N.T.S. 195, 220.

When the United States signed the Convention, it noted: "The Constitution of the United States contains provisions for the protection of individual rights, such as the right of free speech, and nothing in the Convention shall be deemed to require or to authorize legislation or other action by the United States of America incompatible with the provisions of the Constitution of the United States of America."[4] *Id.* at 318.

Likewise, when the United States signed the International Covenant on Civil and Political Rights, it inserted a reservation stating that it "does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States."

Since the signing of those treaties, a number of European countries and Canada have taken a path that is directly contrary to the United States' reservations. For example, they have criminalized speech that is, among other things, seen as "homophobic" or anti-Muslim. Charges have been made against clergy, street preachers, and business owners. But, as one scholar notes: "After it was accepted that criminalizing speech was a desirable way to produce better citizens, finding a stopping point has proven almost impossible and, for those in power, utterly undesirable." Paul Coleman,

---

[4] *See* treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&clang=_en.

Europe's Free Speech Problem: A Cautionary Tale, Public Discourse (July 5, 2016).[5]

The prosecutions and investigations of clergy and the looming scrutiny of social media for hate speech are harbingers of what is coming our way. A significant minority of American millennials believe that the government should be able to prevent people from making public statements offensive to minority groups.[6] The Southern Poverty Law Center is busy designating sincerely religious groups with which it disagrees as extremist groups.[7] *But cf. Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Grp. of Boston*, 515 U.S. 557, 574 (1995) ("[T]he point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful."). The road to the prosecution or investigation of groups like Alliance Defending Freedom leads through Jack Phillips and Masterpiece Cakeshop.

---

[5] http://www.thepublicdiscourse.com/2016/07/17113/.

[6] *See* Jacob Poushter, *40% of Millennials OK with limiting speech offensive to minorities* (Nov. 20, 2016), http://www.pewresearch.org/fact-tank/2015/11/20/40-of-millennials-ok-with-limiting-speech-offensive-to-minorities/.

[7] *Compare* Southern Poverty Law Center, https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom (last visited Aug. 30, 2017) *with* David French, *Media Beware: The Southern Poverty Law Center Has Become a Dangerous Joke*, National Review Online (July 13, 2017), http://www.nationalreview.com/article/449476/splc-dangerous-lies-alliance-defending-freedom-no-hate-group.

A. The respect for free exercise and free speech displayed by some European countries stands in marked contrast with that given by the Constitution of the United States, federal statutes, and this Court's jurisprudence.

In marked contrast with this Court's admonition to stay out of doctrinal disputes in adjudicating Free Exercise cases, prosecutors in some European countries and Britain have pursued Catholic clergy and street preachers who publicly dissent from the prevailing orthodoxy.

In Europe, prosecutions and investigations of clergy have imposed on the ability of churches and individual preachers to define their own doctrine free from official interference. Belgian authorities prosecuted the Catholic bishop of Namur for saying that marriage is "by definition, a stable union between a man and a woman." *See* Coleman, at 3.[8] In 2014, a Spanish prosecutor agreed to investigate Cardinal Aguilar after he called homosexuality a "defective way of expressing sexuality."[9] And, the Catholic bishop in the city of Chur, Switzerland was charged with "inciting people to crime or violence" for quoting passages

---

[8] *See* Jenna Murphy, *Belgian Bishop Cleared of Anti-Homosexual 'crime'*, Catholic Online (June 6, 2008), http://www.catholic.org/news/international/europe/story.php?id=28157.

[9] *See also* Peter Balinski, *Spanish prosecutor to investigate Cardinal-elect for calling homosexuality 'defective'*, Lifesite (Feb. 7, 2014), https://www.lifesitenews.com/news/spanish-prosecutor-to-investigate-cardinal-elect-for-calling-homosexuality.

from the Old Testament in a lecture on marriage and the family.[10]

Street preachers in Great Britain have also been arrested for expressing their views. In 2008, Anthony Rollins was arrested and held for almost four hours for preaching that homosexual conduct is morally wrong.[11] Dale McAlpine was arrested, held for seven hours and charged with using "threatening, abusive or insulting words or behavior likely to cause harassment, alarm or distress" after he told a police officer that the Bible says homosexuality is a sin. Coleman, at 4.[12] John Craven was arrested and held for 19 hours after quoting the Bible and telling two teenagers that God hates the sin but loves the sinner.[13]

Even if no convictions resulted, and several of the preachers received compensation for their arrests, the

---

[10] *See* Lucy Draper, *Swiss Gay Group Files Criminal Complaint Against Catholic Bishop for Old Testament Speech*, Newsweek (Aug. 10, 2015), http://www.newsweek.com/homophobic-swiss-bishoproman-catholic-bishoproman-catholiccatholic-bishop-city-601478.

[11] *See* Steve Doughty, *Payout for anti-gay preacher over arrest: Landmark ruling in Christian's battle for free speech*, The Daily Mail (Dec. 10, 2010), http://www.dailymail.co.uk/news/article-1337292/Payout-anti-gay-preacher-Anthony-Rollins-Landmark-ruling-free-speech-battle.html.

[12] *See also* Heidi Blake, *Christian preacher arrested for saying homosexuality is a sin*, The Telegraph (May 2, 2010), http://www.telegraph.co.uk/news/religion/7668448/Christian-preacher-arrested-for-saying-homosexuality-is-a-sin.html.

[13] *See Street preacher held by Police for 19 hours gets £ 13,000*, The Christian Institute (Mar. 31, 2014), http://www.christian.org.uk/news/street-preacher-held-by-police-for-19-hours-gets-13000/.

danger of hate speech codes remains. As one commentator explains: "The grave danger in Europe's hate speech laws lies not in successful convictions but in the culture of censorship that the laws create: a culture where the phrase 'you can't say that' is commonplace, where citizens do not know the line between allowed and not allowed, where everyone feels he or she is walking on eggshells." Coleman, at 4.

For his part, Sweden's Prime Minister has said that no priest working for the Church of Sweden should be allowed to refuse to marry same-sex couples.[14] That would have the effect of inserting the state into church doctrinal matters, something this Court rejected in *Hosanna-Tabor* and *Kedroff*.

In this regard, the Crown Prosecution Services has declared its intent to treat online communications as hate crimes. A hate crime is "[a]ny criminal offence which is perceived by the victim or any other person, to be motivated by hostility or prejudice, based on a person's disability or perceived disability; race or perceived race; or religion or perceived religion; or sexual orientation or perceived sexual orientation, or a person who is transgender or perceived to be transgender."[15]

---

[14] *See, e.g.*, Dale Hurd, *Swedish Prime Minister: Priests Should Be Forced to Perform Same-Sex Weddings*, CBN News (June 23, 2016), http://www1.cbn.com/cbnnews/world/2017/june/swedish-prime-minister-priests-should-be-forced-to-perform-same-sex-weddings.

[15] *See* Naomi Frisht, *We don't need the State to police hate: Let's trust citizens, not officials, to challenge prejudice online*,

For its part, hostility could mean "ill-will, spite, contempt, prejudice, unfriendliness, antagonism, resentment and dislike."[16]

Even if the prosecutions are limited to expressions of "extreme views," a commentator asks: "[W]ho will decide what constitutes an extreme view? Feminists Germaine Greer and Julie Bindel have been accused of transphobia because they question whether men can become women. If they expressed this opinion online today, would they be arrested?"[17]

B. Canada's Charter of Rights and Freedoms allows a judicial balancing inconsistent with American judicial doctrine and reaches results that this Court would not reach.

Free speech and free exercise fare little better in Canada. In pertinent part, the Canadian Charter of Rights and Freedoms declares that "[e]veryone" has the "fundamental" right to "freedom of conscience and religion" and "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, c 2

Spiked (Aug. 22, 2017), http://www.spiked-online.com/newsite/article/we-dont-need-the-state-to-police-hate/20232#.WZ9KbT6GOUk.

[16] *Id.*

[17] *Id.*; *see also* Andrew Stuttaford, *Britain's War on Free Speech (Continued)*, National Review (Aug. 23, 2017), http://www.nationalreview.com/corner/450735/britains-war-free-speech-continued.

(U.K.). The clarity of that declaration is undercut by § 1 of the Charter, which "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." *Id.* at c 1.

Subjecting fundamental rights to "reasonable limits" enables the "ad hoc balancing of [the] relative social costs and benefits" that this Court has rejected. For example, in *Saskatchewan Human Rights Commission v. Whatcott*, [2013] 1 S.C.R. 467 (Can.), the Supreme Court of Canada upheld sanctions imposed by the Saskatchewan Commission on flyers opposing a pro-homosexual agenda in the public schools. The Commission concluded that the flyers violated § 14 of the Saskatchewan Human Rights Code because they exposed people to hatred and ridicule on the basis of their sexual orientation.

The Canadian Supreme Court concluded that, insofar as § 14 of the Saskatchewan Human Rights Code proscribes "hate speech," "[t]he limitation imposed on freedom of expression . . . appropriately balances the fundamental values underlying freedom of expression with competing Charter rights and other values essential to a free and democratic society." *Id.* at 469-70. It declared the need to suppress "hate speech" in order to "tackl[e] causes of discriminatory activity to reduce the harmful effects and social costs of discrimination" to be a "pressing and substantial" state interest. *Id.* at 470. Even so, the court found, "[e]xpression that 'ridicules, belittles or otherwise affronts the dignity of' does not

rise to the level of ardent and extreme feelings constituting hatred required to uphold the constitutionality of a prohibition of expression in human rights legislation." *Id.* at 471. Accordingly, it held that those words are unconstitutional. *Id.*

The Canadian Supreme Court's action stands in stark contrast with this Court's rejection of an "ad hoc balancing of [the] social costs and benefits" of particular speech. *See, e.g.*, *Stevens*, 559 U.S. at 470. In addition, its view that hate speech can be restricted because "it does little to promote, and can in fact impede, the values underlying freedom of expression," *Saskatchewan*, 1 S.C.R. at 472, is inconsistent with the plurality opinion in *Alvarez*, which rejected the contention that falsity alone is sufficient for a crime because "false statements have no value and hence no First Amendment protection." 567 U.S. at 718. Likewise, that action cannot be reconciled with this Court's decision in *Matal v. Tam* and with Justice Kennedy's concurrence in particular. *See* 137 S. Ct. at 1767 ("[T]he Court's cases have long prohibited the government from justifying a First Amendment burden by pointing to the offensiveness of the speech to be suppressed."). Finally, the Charter would not stop it from finding that R.A.V.'s burning of a cross on a neighbor's lawn could be punished as a speech crime because the benefits of such punishment outweighed the cost of suppressing that and other speech.

Similarly, in *Brillinger v. Brockie*, the Ontario Human Rights Commission found that Brockie and his printing business discriminated on the basis of sexual

orientation when he declined to print letterhead, envelopes, and business cards for a homosexual advocacy group because it was inconsistent with his Christian beliefs. *Brillinger v. Brockie*, (2000) 00-003-R (OHRC). The Commission concluded that it was "reasonable to limit Brockie's freedom of religion in order to prevent the very real harm to members of the lesbian and gay community."[18] *Id.* at 10. The Ontario Divisional Court upheld the Commission's action, although it modified the remedy so that Brockie would not have to "print material of a nature which could reasonably be considered to be in direct conflict with the core elements of his religious beliefs or creed." Hans C. Clausen, Note, *The "Privilege of Speech" in a "Pleasantly Authoritarian Country": How Canada's Judiciary Allowed Laws Proscribing Discourse Critical of Homosexuality to Trump Free Speech and Religious Liberty*, 38 Vand. J. Transnat'l L. 443, 477 (2005).

Canada's fixation on criminalizing breaches of human rights codes extends to religion. In Ontario, an anti-Muslim commentator has been charged with hate-motivated crimes for posting videos critical of Muslims. The charge could get Kevin Johnston two years in prison.[19] And, the founder and leader of the Jewish Defense League of Canada filed a complaint

---

[18] https://archive.org/stream/boi00_003_R/boi00_003_R_djvu.txt para. 9.

[19] *See* Miriam Katawazi, *Mississauga man faces hate-crime charge after probe into online material targeting Muslims*, The Globe and Mail (July 24, 2017), https://www.theglobeandmail.com/news/toronto/mississauga-man-faces-hate-crime-charge-after-probe-into-online-material-targeting-muslims/article35783763.

rise to the level of ardent and extreme feelings constituting hatred required to uphold the constitutionality of a prohibition of expression in human rights legislation." *Id.* at 471. Accordingly, it held that those words are unconstitutional. *Id.*

The Canadian Supreme Court's action stands in stark contrast with this Court's rejection of an "ad hoc balancing of [the] social costs and benefits" of particular speech. *See, e.g., Stevens*, 559 U.S. at 470. In addition, its view that hate speech can be restricted because "it does little to promote, and can in fact impede, the values underlying freedom of expression," *Saskatchewan*, 1 S.C.R. at 472, is inconsistent with the plurality opinion in *Alvarez*, which rejected the contention that falsity alone is sufficient for a crime because "false statements have no value and hence no First Amendment protection." 567 U.S. at 718. Likewise, that action cannot be reconciled with this Court's decision in *Matal v. Tam* and with Justice Kennedy's concurrence in particular. *See* 137 S. Ct. at 1767 ("[T]he Court's cases have long prohibited the government from justifying a First Amendment burden by pointing to the offensiveness of the speech to be suppressed."). Finally, the Charter would not stop it from finding that R.A.V.'s burning of a cross on a neighbor's lawn could be punished as a speech crime because the benefits of such punishment outweighed the cost of suppressing that and other speech.

Similarly, in *Brillinger v. Brockie*, the Ontario Human Rights Commission found that Brockie and his printing business discriminated on the basis of sexual

orientation when he declined to print letterhead, envelopes, and business cards for a homosexual advocacy group because it was inconsistent with his Christian beliefs. *Brillinger v. Brockie*, (2000) 00-003-R (OHRC). The Commission concluded that it was "reasonable to limit Brockie's freedom of religion in order to prevent the very real harm to members of the lesbian and gay community."[18] *Id.* at 10. The Ontario Divisional Court upheld the Commission's action, although it modified the remedy so that Brockie would not have to "print material of a nature which could reasonably be considered to be in direct conflict with the core elements of his religious beliefs or creed." Hans C. Clausen, Note, *The "Privilege of Speech" in a "Pleasantly Authoritarian Country": How Canada's Judiciary Allowed Laws Proscribing Discourse Critical of Homosexuality to Trump Free Speech and Religious Liberty*, 38 Vand. J. Transnat'l L. 443, 477 (2005).

Canada's fixation on criminalizing breaches of human rights codes extends to religion. In Ontario, an anti-Muslim commentator has been charged with hate-motivated crimes for posting videos critical of Muslims. The charge could get Kevin Johnston two years in prison.[19] And, the founder and leader of the Jewish Defense League of Canada filed a complaint

---

[18] https://archive.org/stream/boi00_003_R/boi00_003_R_djvu.txt para. 9.

[19] *See* Miriam Katawazi, *Mississauga man faces hate-crime charge after probe into online material targeting Muslims*, The Globe and Mail (July 24, 2017), https://www.theglobeandmail.com/news/toronto/mississauga-man-faces-hate-crime-charge-after-probe-into-online-material-targeting-muslims/article35783763.

against a Toronto mosque whose imam was accused of calling for the killing of Jews.[20]

Just as election laws in the United States allow the political parties to tie their opponents up in process, the wide-ranging activities of Human Rights Commissions and prosecutors acting under human rights and hate speech laws promise only more rancor.

III. This Court should not abandon its First Amendment jurisprudence for that of Europe and Canada.

This Court's First Amendment jurisprudence should not be set aside in this case because it is well-grounded in several ways. First, in his *Alvarez* plurality opinion and in his *Matal* concurrence, Justice Kennedy and his colleagues pointed to the "general" matters, rule, and the lack of such an exception to a well-established proposition and "long prohibit[ion]." *See Alvarez*, 567 U.S. at 718; *Matal*, 137 S. Ct. at 1767. As the plurality explained in *Alvarez*, the remedy for speech that we do not like is counter-speech. Second, in the Free Exercise arena, *Sherbert v. Verner* was decided in 1963, and decisions respectful of the dignity of sincerely held religious beliefs have followed since.

In Justice Kennedy's concurring opinion in *Hobby Lobby*, he noted the way in which the free exercise

---

[20] Ron Csillag, *JDL leader files hate complaint against imam who urged killing Jews*, The Canadian Jewish News (Feb. 22, 2017), http://www.cjnews.com/news/canada/jdl-leader-files-hate-complaint-imam-urged-killing-jews.

of religion is "essential" to the "self-definition" and "dignity" of religious believers. *See* 134 S. Ct. at 2785 (Kennedy, J., concurring). *Amici* recognize that the individual respondents are entitled to a dignity of their own, but that should not come at the expense of Jack Phillips' own dignity.

CONCLUSION

Put simply, under the First Amendment, religious believers in the United States have a dignity of their own that is entitled to protection. This Court should not send the United States or any of the States into the European and Canadian zones of hate speech prosecution. Such prosecutions are alien to our constitutional order.

For the foregoing reasons, and those stated by Petitioners, *amici* respectfully requests that this Court reverse the decision of the court below.

Respectfully submitted,

KIMBERLY S. HERMANN
SOUTHEASTERN
LEGAL FOUNDATION
2255 Sewell Mill Rd.,
Ste. 320
Marietta, Georgia 30062

JOHN J. PARK, JR.
Counsel of Record
STRICKLAND BROCKINGTON
LEWIS LLP
1170 Peachtree St.,
Ste. 2200
Atlanta, Georgia 30309
(678) 347-2208
jjp@sbllaw.net

Counsel for Amici Curiae

September 1, 2017